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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-493

EDWARD S. REDINGTON, as Trustee for the liquidation of the business of Weis Securities, Inc.,

Petitioner,

–against–

TOUCHE ROSS & CO., and SECURITIES INVESTOR PROTECTION CORPORATION,

Respondents.

BRIEF OF RESPONDENT TOUCHE ROSS & CO. IN OPPOSITION TO THE CROSS-PETITION FOR A WRIT OF CERTIORARI

ARNOLD I. ROTH
Attorney for Respondent
Touche Ross & Co.
575 Madison Avenue
New York, New York 10022
(212) 644-7000

Of Counsel
ARTHUR S. LINKER
ROSENMAN COLIN FREUND LEWIS & COHEN
575 Madison Avenue
New York, New York 10022

INDEX

PAGE

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED . 2

COUNTER-STATEMENT OF THE CASE 2

A. The Trustee's Common Law Claims 3

B. The Trustee's Jurisdictional Contentions 4

C. The District Court's Dismissal Of This Action, And Its Rejection Of The Trustee's Contention of Bankruptcy Act Jurisdiction 6

D. The Decision Of The Court Of Appeals, And Its Express Refusal To Pass Upon The District Court's Holding That There Is No Bankruptcy Act Jurisdiction 8

THE REASONS FOR DENYING THE CROSS-PETITION .. 8

I. Review By This Court Of The Issues Raised By The Cross-Petition Would Be Inappropriate Because The Court Of Appeals Did Not Pass Upon Them, And Because None Of The Reasons For Such Review Exists Here 8

II. The District Court Correctly Held That Touche Ross Did Not "Consent" To Jurisdiction In This Plenary Action By Filing Proofs Of Claim 13

A. The Proofs Of Claim Do Not Confer Jurisdiction In This Plenary Action 14

B. The Proofs Of Claim Would Not Confer Jurisdiction Even In A Summary Proceeding 17

PAGE

III. The District Court Correctly Held That Section 23 Of The Bankruptcy Act Is Applicable To Preclude The Exercise Of Bankruptcy Act Jurisdiction, And That The Other Statutory Provisions Relied Upon By The Trustee Do Not Require A Contrary Result 21

A. Section 23 Is Incorporated Into SIPA By Section 6(c)(1) Thereof And Applies Here To Preclude Bankruptcy Act Jurisdiction 22

B. Sections 5(b)(2) And 6(b)(1) Of SIPA Do Not Provide Jurisdiction For The Trustee's Common Law Claims 24

C. Section 115 Of The Bankruptcy Act Does Not Provide Jurisdiction For The Trustee's Common Law Claims 26

CONCLUSION 29

TABLE OF AUTHORITIES

CASES:

PAGE

Bardes v. *Hawarden Bank*, 178 U.S. 524 (1900) 14, 28

Beacon Theatres v. *Westover*, 359 U.S. 500 (1959) 21

In re Beasly-Gilbert's, Inc., 285 F.Supp. 359 (S.D. Ohio 1968) 21

In re Behring & Behring, 445 F.2d 1096 (5th Cir.), *cert. denied*, 404 U.S. 991 (1971) 21

Bivens v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) 8

Bryan v. *Bernheimer*, 181 U.S. 188 (1901) 28

In re Carnell Constr. Corp., 424 F.2d 296 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970) 21

Cline v. *Kaplan*, 323 U.S. 97 (1944) 25

Columbia Foundry Co. v. *Lochner*, 179 F.2d 630 (4th Cir. 1950) 18

Continental Illinois Nat'l Bank & Trust v. *Chicago, R.I. & Pac. Ry. Co.*, 294 U.S. 648 (1935) 25

Conway v. *Union Bank of Switzerland*, 204 F.2d 603 (2d Cir. 1953) 19

Cumberland Glass Manufacturing Co. v. *De Witt & Co.*, 237 U.S. 447 (1915) 19

Daniel v. *Guaranty Trust Co.*, 285 U.S. 154 (1932) 20

Detroit Trust Co. v. *Pontiac Savings Bank*, 196 Fed. 29 (6th Cir. 1912), *aff'd*, 237 U.S. 186 (1915) 16

Duda v. *Sterling Mfg. Co.*, 178 F.2d 428 (8th Cir. 1949) 25

In re Farrell Publishing Corp., 130 F.Supp. 449 (S.D.N.Y. 1955) 18

First National Bank v. *Title & Trust Co.*, 198 U.S. 280 (1905) 28

PAGE

Giffin v. *Vought*, 175 F.2d 186 (2d Cir. 1949) . 18
Gill v. *Phillips*, 337 F.2d 258 (5th Cir. 1964) .. 21
Gins v. *Mauser Plumbing Supply Co.*, 148 F.2d 974 (2d Cir. 1945) 16
Green v. *Gage*, 186 F.2d 984 (5th Cir. 1951) .. 16
Halpert v. *Engine Air Service*, 116 F.Supp. 13 (E.D.N.Y. 1953) 17
Harrison v. *Chamberlin*, 271 U.S. 191 (1926) .. 25
Houston Oil Co. of Texas v. *Goodrich*, 245 U.S. 440 (1918) 12
Katchen v. *Landy*, 336 F.2d 535 (10th Cir. 1964), *aff'd*, 382 U.S. 323 (1966) 15, 18-21
Kelley v. *Gill*, 245 U.S. 116 (1917) 14, 25
Layne & Bowler Corp. v. *Western Well Works, Inc.*, 261 U.S. 387 (1923) 12
Marconi Wireless Co. v. *Simon*, 246 U.S. 46 (1918) 10
Mar-Tex Realization Corp. v. *Wolfson*, 145 F.2d 360 (2d Cir. 1944) 25
May v. *Moss*, 194 F.2d 133 (8th Cir.), *cert. denied*, 343 U.S. 952 (1952) 16
In re Oliver, 127 F. Supp. 842 (D. Kan. 1955) 25
Owens v. *Union Pacific Railroad Co.*, 319 U.S. 715 (1943) 9
In re Prima Co., 98 F.2d 952 (7th Cir.), *cert. denied*, 305 U.S. 658 (1938) 16, 27, 29
In re Prudence Bonds Corp., 75 F.2d 262 (2d Cir. 1935) 25, 27
In re Prudence Co., 82 F.2d 755 (2d Cir.), *cert. denied*, 298 U.S. 685 (1936) 27
Rice v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955) 12
Schumacher v. *Beeler*, 293 U.S. 367 (1934) ..14, 16
Securities & Exchange Commission v. *Morgan Kennedy & Co., Inc.*, [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,568 (S.D.N.Y. 1974) 23, 26

PAGE

Slenderella Systems of Berkeley, Inc. v. *Pacific Tel. & Tel.*, 286 F.2d 488 (2d Cir. 1961) 25
Southern Power Co. v. *North Carolina Public Service Co.*, 263 U.S. 508 (1924) 12
In re Standard Gas & Elec. Co., 119 F.2d 658 (3d Cir. 1941) 25, 27, 28
Stiefel v. *14th Street & Broadway Realty Corp.*, 48 F.2d 1041 (2d Cir. 1931) 17
Tamasha Town & Country Club v. *McAlester Constr. Fin. Corp.*, 252 F.Supp. 80 (S.D. Cal. 1966) 15, 25
Taubel-Scott-Kitzmiller v. *Fox*, 264 U.S. 426 (1924) 25
Tenenbaum v. *Walter E. Heller & Co.*,308 F. Supp. 1085 (S.D.N.Y. 1970) 15
Thompson v. *Terminal Shares*, 104 F.2d 1 (8th Cir. 1939) 25
Tilton v. *Model Taxi Corp.*, 112 F.2d 86 (2d Cir. 1940) 16, 29
Toledo Fence & Post Co. v. *Lyons*, 290 Fed. 637 (6th Cir. 1923) 16
United States v. *Johnston*, 268 U.S. 220 (1925). 12
United States v. *Tacoma Oriental S. S. Co.*, 86 F.2d 363 (9th Cir. 1936) 27
Williams v. *Austrian*, 331 U.S. 642 (1947) ...14, 28
Wymard v. *McCloskey & Co.*, 342 F.2d 495 (3d Cir.), *cert. denied*, 382 U.S. 823 (1965) 16

STATUTES AND RULES:

Bankruptcy Act (11 U.S.C. §§ 1 *et seq.*)

Section 2a(7), 11 U.S.C. § 11a(7) 5, 7, 28
Section 23, 11 U.S.C. § 46 .....2, 5-7, 14-17, 21-23, 28, 29
Section 57g, 11 U.S.C. § 93g 19
Section 68a, 11 U.S.C. § 108a 11, 19
Section 75(n), 11 U.S.C. § 203(n) 25
Section 77, 11 U.S.C. § 205 25

PAGE

Section 77B, 48 Stat. 911 .....25, 27-29
Section 82(a), 11 U.S.C. § 402(a) 25
Section 102, 11 U.S.C. § 502 .....5, 7, 22, 28
Section 111, 11 U.S.C. § 511 25
Section 115, 11 U.S.C. § 515 .....5, 7, 22, 26-29
Section 311, 11 U.S.C. § 711 25
Section 411, 11 U.S.C. § 811 25
Section 611, 11 U.S.C. § 1011 25

Securities Exchange Act of 1934 (15 U.S.C. §§ 78a *et seq.*)

Section 17, 15 U.S.C. § 78q 2-6, 8-11
Section 27, 15 U.S.C. § 78aa 4

Securities Investor Protection Act of 1970 (15 U.S.C. §§ 78aaa *et seq.*), as in effect prior to amendment by Pub. L. No. 95-283, 92 Stat. 249 (May 21, 1978),

Section 5, 15 U.S.C. § 78eee 7, 22, 24-26
Section 6, 15 U.S.C. § 78fff 2, 5-7, 21-24, 26, 28

Securities Investor Protection Act of 1970 (15 U.S.C. §§ 78aaa *et seq.*), as amended by Pub. L. No. 95-283, 92 Stat. 249 (May 21, 1978),

Section 5(b)(2), 15 U.S.C.A. § 78eee(b)(2) (Supp. II 1978) 26
Section 6(b), 15 U.S.C.A. § 78fff(b) (Supp. II 1978) 23
Section 7(a), 15 U.S.C.A. § 78fff-1(a) (Supp. II 1978) 26
Section 16(1), 15 U.S.C.A. § 78lll(1) (Supp. II 1978) 23

CONGRESSIONAL MATERIALS:

124 CONG. REC. H 11,047 (daily ed. Sept. 28, 1978)..... 13
124 CONG. REC. H 11,082 (daily ed. Sept. 28, 1978) 13

PAGE

124 CONG. REC. S 17,405 (daily ed. Oct. 6, 1978) 13
H. R. 8200, 95th Cong., 2d Sess. (1978) 13
S. REP. No. 1916, 75th Cong., 3d Sess. (1938) . 27
S. REP. No. 95-763, 95th Cong., 2d Sess., *reprinted in* [1978] U. S. CODE CONG. & AD. NEWS 1344, 1354 23

TREATISES:

W. COLLIER, BANKRUPTCY 16, 19, 23, 27

ARTICLES:

Ferguson, *The Consensual Basis of Subject-Matter Jurisdiction in Matters of Bankruptcy: Fact and Fiction,* 14 Rutgers L. Rev. 491 (1959) 21

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No. 78-493

EDWARD S. REDINGTON, as Trustee for the liquidation of the business of Weis Securities, Inc.,

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–against–

TOUCHE ROSS & CO., and SECURITIES INVESTOR PROTECTION CORPORATION,

Respondents.

BRIEF OF RESPONDENT TOUCHE ROSS & CO. IN OPPOSITION TO THE CROSS-PETITION FOR A WRIT OF CERTIORARI

Respondent Touche Ross & Co. ("Touche Ross"), which is also petitioner in No. 78-309 and respondent in No. 78-526, submits this brief in opposition to the cross-petition of Edward S. Redington (the "Trustee"), as Trustee for the liquidation of the business of Weis Securities, Inc. ("Weis"), for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered herein on April 21, 1978.[1]

[1]The decisions below are reproduced in the Appendix to Touche Ross' Petition in No. 78-309. Numerals followed by the letter "a" are page references to that Appendix.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Was the District Court correct in its holding (as to which the Court of Appeals stated that it expressed no opinion) that, by filing proofs of claim in the proceeding to liquidate the business of a defunct securities brokerage firm under the Securities Investor Protection Act of 1970, a creditor did not "consent" to the jurisdiction of the District Court in a separate *plenary* action subsequently commenced by the trustee on unrelated state common law claims against the creditor?

2. Was the District Court correct in its holding (as to which the Court of Appeals stated that it expressed no opinion) that, unlike a Chapter X reorganization court or a federal equity receivership court, its plenary jurisdiction was limited by Section 23 of the Bankruptcy Act, which was incorporated into the Securities Investor Protection Act of 1970 by Section 6(c)(1) thereof?

COUNTER-STATEMENT OF THE CASE

The Trustee, who was appointed and is acting pursuant to the Securities Investor Protection Act of 1970 ("SIPA"), is liquidating the business of Weis, a defunct brokerage firm which collapsed in May 1973. The Trustee and respondent Securities Investor Protection Corporation ("SIPC") commenced this plenary action against Touche Ross in April 1976 in the United States District Court for the Southern District of New York, asserting both federal claims (under Section 17(a) of the Securities Exchange Act of 1934 (the "1934 Act")) and common law claims seeking damages from Touche Ross by reason of its allegedly improper audit of financial reports (the "1972 Weis financial reports") of Weis for periods ending May 26, 1972. The commencement of this plenary federal action occurred almost a year after the Trustee and SIPC had commenced a still-pending, almost identical plenary action (the "State Court Action") against Touche Ross in the New York state courts.[2]

Touche Ross' Petition in No. 78-309 seeks to have this Court review the decision of the Court of Appeals majority reversing the District Court and holding that the Trustee and SIPC are entitled to assert federal claims under Section 17(a) of the 1934 Act. The Trustee's cross-petition seeks to have this Court review the decision of *the District Court* that the Bankruptcy Act (provisions of which are incorporated into SIPA) does not grant subject matter jurisdiction over the Trustee's common law claims—a decision which the Court of Appeals left undisturbed and as to which it "express[ed] no opinion" (3a[n.3]).

The pertinent facts, which also are set forth in relevant part in Touche Ross' Petition in No. 78-309, may be briefly summarized as follows:

A. The Trustee's Common Law Claims

In the complaint herein (just as in the complaint in the State Court Action), the Trustee seeks relief with respect to Touche Ross' alleged conduct of its mid-1972 audit of the 1972 Weis financial reports. According to the complaint,[3] certain officers of Weis had misstated the

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[2]The State Court Action was commenced in July 1975. The only material difference in the two actions is the addition in the complaint in this action of the few allegations deemed by the Trustee and SIPC to be necessary to assert claims under Section 17(a) of the 1934 Act. As the Court of Appeals majority put it, "[t]he common allegations of the plaintiffs in the state court complaint were the same as those in the instant case, except that three paragraphs dealing with claims under section 17 of the [19]34 Act were omitted. Five of the Trustee's six present 'causes of action' appear in identical form in the state action, as do four of SIPC's eight present claims. The additional claims in this action are the federal securities law claims" (5a).

[3]The complaint is reproduced in the appendix to SIPC's brief in opposition to Touche Ross' Petition in No. 78-309.

financial condition and results of operations of Weis in the 1972 Weis financial reports, and had made it appear therein that Weis had pre-tax earnings for the fiscal year of $1,700,000, whereas Weis actually had suffered losses in excess of $1,500,000. Touche Ross allegedly performed its audit of the 1972 Weis financial reports in a "negligent, reckless, careless, unskilled and grossly negligent manner", and therefore not only failed to discover the misstatements but also improperly certified that the 1972 Weis financial reports fairly and accurately presented the financial condition of Weis in accordance with generally accepted accounting principles. It is alleged that if Touche Ross had discovered the misstatements in the 1972 Weis financial reports, Weis' declining financial position and the waste of its assets would have been revealed earlier, remedial action such as a change in the Weis management or merger with another firm could have been taken, the forced liquidation of Weis could have been averted or its adverse consequences reduced, and the losses here sued for would not have occurred.

On the basis of the foregoing, the Trustee asserts (in addition to his federal claim under Section 17(a)) common law claims for accountants' negligence and malpractice, breach of contract and breach of warranty, and seeks to recover from Touche Ross damages of $51,000,000.

B. The Trustee's Jurisdictional Contentions

The Trustee's jurisdictional allegations are set forth in paragraph 2 of the complaint. After alleging that Section 27 of the 1934 Act provides jurisdiction for his federal Section 17(a) claim, he alleges as one basis for subject matter jurisdiction over his common law claims the "principles of pendent jurisdiction". However, recognizing that there would be no proper basis for the exercise of pendent jurisdiction if it were held that he may not assert a federal claim under Section 17(a), and

also recognizing that the exercise of pendent jurisdiction would be discretionary with the District Court even if his Section 17(a) claim were upheld (particularly in light of the pendency of the State Court Action asserting the identical common law claims), the Trustee also alleges that specified sections of the Bankruptcy Act provide an additional jurisdictional basis for his common law claims. Specifically, the Trustee alleges that jurisdiction is provided by "Sections 2a(7), 102 and 115 of the Bankruptcy Act (11 U.S.C. Sections 11a(7), 502 and 515)", together with "Section 6" of SIPA, which provides for reference to provisions of the Bankruptcy Act.

In seeking in the District Court to support his contention of Bankruptcy Act jurisdiction over his common law claims, the Trustee also asserted that such jurisdiction exists in this *plenary* action because of Touche Ross' purported "consent" to the bankruptcy court's *summary* jurisdiction by filing claims in the Weis liquidation proceeding for services rendered by Touche Ross to Weis in late 1972 and 1973, well after the completion of the mid-1972 audit work on the 1972 Weis financial reports.[4] However, the complaint significantly does not assert any claim relating to (or even mention) the later services, and does not allege "consent" or Section 23 of the Bankruptcy Act (which authorizes certain consent jurisdiction) as a jurisdictional basis.

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[4]The Trustee's cross-petition (pp. 4-5) describes Touche Ross' "two proofs of claim in the Weis liquidation" as follows: "One claim sought $67,972 for commencing work on Weis' 1973 audit as well as a smaller amount ($7,471) for services performed by Touche Ross at Weis' London and Paris offices. The other claim sought $11,664 for services allegedly rendered in connection with the investigation of Weis' books and records conducted in late April and May of 1973 by the Securities and Exchange Commission and the New York Stock Exchange. The bulk of this claim is attributable to meetings with the SEC and the Exchange and '[s]ubstantiation and documentation of alleged fraudulent bookkeeping practices and entries.' "

C. The District Court's Dismissal Of This Action, And Its Rejection Of The Trustee's Contention Of Bankruptcy Act Jurisdiction

The District Court granted Touche Ross' motion to dismiss this action (40a-58a), and in so doing expressly rejected the Trustee's contention that it had subject matter jurisdiction over his common law claims.[5] The District Court first dismissed the Trustee's federal Section 17(a) claim for failure to state a claim upon which relief can be granted (47a-55a), and held that by reason of such dismissal pendent jurisdiction of the Trustee's common law claims was lacking (55a). The District Court then held that the Bankruptcy Act did not provide subject matter jurisdiction for the Trustee's common law claims (55a-57a).

With respect to the Trustee's contention of Bankruptcy Act jurisdiction, the District Court held that "[t]he situation at bar . . . is controlled by [Section 23 of the Bankruptcy Act] 11 U.S.C. § 46 which provides that a trustee in bankruptcy may sue only in the courts where the bankrupt might have sued", and that subject matter jurisdiction of the Trustee's common law claims is lacking because "[d]iversity jurisdiction would not exist of an action by Weis against Touche [Ross]" (55a-57a).[6] The District Court concluded that Section 23 is applicable and controlling because it is incorporated into SIPA by Section 6(c)(1) thereof (55a-56a).

[5]Touche Ross' motion sought, *inter alia*, (i) dismissal of the Trustee's federal Section 17(a) claim for failure to state a claim upon which relief can be granted, (ii) dismissal of the Trustee's common law claims for lack of subject matter jurisdiction, (iii) dismissal of certain of the Trustee's common law claims for failure to state a claim upon which relief can be granted, and (iv) alternatively, a stay of this action pending determination of the State Court Action. It was unnecessary for the District Court to reach, and it did not consider, issues (iii) and (iv).

[6]The Trustee has never challenged the showing to the District Court, or the District Court's finding, that both Weis and Touche Ross are citizens of New York for purposes of determining whether diversity jurisdiction exists.

The District Court "considered" and rejected the Trustee's argument that Sections 2a(7), 102 and 115 of the Bankruptcy Act, as allegedly made applicable by Sections 5(b)(2) (another provision not set forth in the Trustee's jurisdictional allegations) and 6(b)(1) of SIPA, confer upon the District Court the broad plenary jurisdiction of a Chapter X reorganization court and a federal equity receivership court—a jurisdiction which was claimed by the Trustee to extend to *any* action commenced by him (56a).

The District Court also considered and rejected the Trustee's argument, made for the first time after Touche Ross had demonstrated on its motion to dismiss that Section 23 did not permit the exercise of Bankruptcy Act jurisdiction, that Touche Ross had "consented" to such jurisdiction within the meaning of Section 23 by filing its two proofs of claim in the Weis liquidation proceeding. The District Court found that the Trustee's common law claims here for negligence and malpractice, breach of warranty, and breach of contract—claims based upon Touche Ross' mid-1972 audit of the 1972 Weis financial reports—were "unrelated" to the claims filed in the liquidation by Touche Ross for other services rendered to Weis in late 1972 and 1973, stating that "[t]he claim by the Trustee against Touche [Ross] does not arise out of any work done for Weis by Touche [Ross] and for which Touche [Ross] filed a claim in the Weis liquidation" and therefore "the consent of Touche [Ross] cannot be found" (56a).[7]

[7]Apparently because the Trustee characterized one of the Touche Ross claims as a "priority" or administrative claim, the District Court also found that such claim and the Trustee's common law claims against Touche Ross based upon services performed by Touche Ross almost a year before the Weis collapse were not "mutual" (56a). As noted (p. 5, n.4, *supra*), one of Touche Ross' proofs of claim referred in part to services performed in 1973 in connection with "[s]ubstantiation and documentation of alleged fraudulent bookkeeping practices and entries". Nothing in the record supports the Trustee's bald assertion that the practices and entries referred to in that claim are the same as the alleged fraudulent practices and entries which Touche Ross did not detect in mid-1972 (Cross-Petition, pp. 5, 12), and the District Court properly rejected that assertion.

D. The Decision Of The Court Of Appeals, And Its Express Refusal to Pass Upon The District Court's Holding That There Is No Bankruptcy Act Jurisdiction

The Court of Appeals majority reversed the District Court's holding with respect to the Trustee's federal Section 17(a) claim and remanded for further proceedings. However, the Court of Appeals majority expressly refused to pass upon the District Court's holding that there is no Bankruptcy Act jurisdiction, stating that "[b]ecause of the view we take of the case, we need express no opinion as to the scope of bankruptcy jurisdiction in SIPA-receivership cases" (3a[n.3]). Even though the Court of Appeals thus has not considered or ruled upon the question, the Trustee seeks by his cross-petition to have this Court review the District Court's holding that there is no Bankruptcy Act jurisdiction over his common law claims.

THE REASONS FOR DENYING THE CROSS-PETITION

I

Review By This Court Of The Issues Raised By The Cross-Petition Would Be Inappropriate Because The Court Of Appeals Did Not Pass Upon Them, And Because None Of The Reasons For Such Review Exists Here

1. It hardly needs emphasizing that, since the Court of Appeals expressly declined to consider and pass upon the issues raised by the cross-petition, and since the cross-petition therefore is simply seeking review of the District Court decision, such issues are not ripe for review by this Court and such review at this juncture would be premature and inappropriate. *Cf., e.g., Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 397-398 (1971); *Owens* v. *Union Pacific Railroad Co.*, 319 U.S. 715, 724-725 (1943).

2. The Trustee argues that the refusal by the Court of Appeals to decide the issue of Bankruptcy Act jurisdiction "has left this action in a peculiar posture", because "if this Court were to accept certiorari [in No. 78-309] and reverse on the Section 17 question . . . the Trustee could find that he is out of federal court on his non-Section 17 [*i.e.*, common law] claims for relief without ever having had a resolution of the question of jurisdiction over those claims" (Cross-Petition, pp. 6-7). The Trustee's argument misses the point here and does not justify granting the cross-petition. It is obvious that if this Court were to reverse the decision of Court of Appeals majority on the "Section 17 question", this action could be remanded to the Court of Appeals and the Trustee could at that time assert *to the Court of Appeals* for resolution by it whatever arguments he has on the issue of jurisdiction over his common law claims.[8] In other words, and contrary to the Trustee's argument that "this action [is] in a peculiar posture", the Trustee is not likely to be foreclosed from asserting to the Court of Appeals such jurisdictional arguments as he is entitled to make.[9]

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[8]The Trustee also speculates that even if his federal Section 17(a) claim were to be left standing, the District Court could refuse to exercise pendent jurisdiction and put him "out of federal court" on his common law claims (Cross-Petition, p. 7). If that hypothetical situation actually were to arise, however, and should it be of any actual consequence to the Trustee, he then could raise the jurisdictional issue on appeal to the Court of Appeals from any judgment entered in this action.

[9]That the Trustee actually understands that the issues raised by the cross-petition are not ripe for review by this Court because they have not been passed upon by the Court of Appeals, and that his real interest is in not being foreclosed from raising those issues in the Court of Appeals should this Court reverse on the Section 17(a) issues, is seen from his assertion that "this Court should grant

3. Moreover, even if it be assumed that the Trustee were correct in speculating that upon reversal by this Court on the Section 17(a) issues he could be "out of federal court on his non-Section 17 [*i.e.*, common law] claims for relief without ever having had a [Court of Appeals] resolution of the question of jurisdiction over those claims", the Trustee will not in any event be foreclosed from litigating his common law claims. He simply will continue to proceed in his State Court Action, which is still pending and in which those very same claims are asserted. Thus, the worst consequence that could befall the Trustee as a result of the so-called "peculiar posture" of this action would be that he is relegated to the State Court Action to litigate his common law claims—hardly a matter of "national importance", to use the Trustee's words (Cross-Petition, p. 7), sufficient to warrant review by this Court. This is particularly so since that "worst consequence" is actually the proper result which should be achieved in this action—*i.e.*, the Trustee ought to litigate his common law claims in a common law forum (*i.e.*, in his State Court Action), and he ought not be permitted further to burden *both* the New York state courts (in the State

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certiorari at least for the purposes of remanding for orderly consideration of the jurisdictional issues by the Court of Appeals" (Cross-Petition, p. 7, see also p. 15). Of course, it is totally unnecessary to grant the cross-petition for that purpose, since the matter can be handled in any decision that would result from the granting of certiorari on Touche Ross' Petition in No. 78-309. *Cf.*, *e.g.*, *Marconi Wireless Co.* v. *Simon*, 246 U.S. 46, 57 (1918) (in reversing and remanding to the court of appeals, this Court declined to decide an issue not passed upon by the court of appeals because "to do this would call for the exercise on our part of a duty which it was the province of the court below to perform and *which doubtless it would have performed but for the error into which it fell . . . [The issues should] be considered for what they are worth by the court below, if duly presented and relied upon, when it comes hereafter to consider the controversy*" (emphasis added)).

Court Action) and the federal courts (in this action) with parallel but separate proceedings on those claims.[10]

4. There are other reasons why, although the Trustee hyperbolizes about "the national importance of the jurisdictional issue" (Cross-Petition, p. 7), that "issue" simply does not rise to any level of importance which could justify its review by this Court. For example, the decision of the District Court does not conflict, and the Trustee does not claim that it conflicts, with any controlling decision of this Court or with any such decision in any court of appeals.

5. Moreover, the District Court decision is based in substantial part on an essentially factual determination with which the Trustee disagrees—*viz.*, that there is no "consent" jurisdiction because the Trustee's common law claims "[do] not arise out of any work done for Weis by Touche [Ross] and for which Touche [Ross] filed a claim in the Weis liquidation", and because the claims therefore are "unrelated" (56a).[11] Such issues of fact are

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[10]A matter of "national importance" which does exist in this action, and which distinguishes Touche Ross' Petition in No. 78-309 from the Trustee's cross-petition, is the serious and substantial question of whether the Trustee and SIPC are to be permitted to "federalize"—*i.e.*, to create jurisdiction in the federal courts so as to compel them to accept the burden of deciding—what are nothing more than common law claims simply by alleging that the conduct complained of also violates Section 17(a) of the 1934 Act (see, *e.g.*, Petition in No. 78-309, p. 33). That question is squarely raised by Touche Ross' Petition, and is one so consequential for an already overburdened federal court system that this Court should grant Touche Ross' Petition to pass upon it.

[11]The Trustee asserts that the facts are different than as found by the District Court, and argues that "this case presents a uniquely appropriate *factual opportunity* for this Court to resolve the question" (emphasis added) (Cross-Petition, p. 12). The Trustee elsewhere asserts that the District Court "apparently believed [as does the Trustee] that mutuality under Section 68 should be the controlling standard" but simply "erred" in applying that standard to the facts (*Id.* at pp. 10-11 n.6).

simply not a proper subject for review on certiorari. *See, e.g., United States* v. *Johnston,* 268 U.S. 220, 227 (1925); *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U.S. 508, 509 (1924); *Houston Oil Co. of Texas* v. *Goodrich,* 245 U.S. 440 (1918).

6. At bottom, the District Court decision on the issues raised by the cross-petition is simply a lower court decision without substantial impact beyond the parties to this action and the specific factual situation presented. As such it does not warrant review by this Court, because it is "of importance merely to the litigants and [does] not present an issue of immediate public importance". *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 79 n.2 (1955); *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923). Although the Trustee asserts that the lower federal courts "have applied a number of different standards" with respect to determining the scope of "consent" jurisdiction (Cross-Petition, pp. 10-11), it is apparent—even if it be assumed that there is some actual conflict among the "different standards" (as opposed to mere variety in the language used by various courts to explain the same legal concept)—that here the District Court found jurisdiction to be lacking even under the most lenient of such "standards" (see also pp. 17-21, *infra*). The Trustee does talk at length of a general and purportedly "widely recognized" need to clarify jurisdictional issues which might arise under the Bankruptcy Act, and to "clarify for claimants and litigants in bankruptcy proceedings throughout the country their rights and liabilities in subjecting themselves to the jurisdiction of a Court of Bankruptcy" (*e.g.,* Cross-Petition, p. 9), but that generalized, abstract need—even assuming it to exist—does not justify the granting of certiorari here. *E.g., Rice* v. *Sioux City Memorial Park Cemetery, Inc., supra,* 349 U.S. at 74

("A federal question raised by a petitioner may be of 'substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues").

7. It also would be inappropriate to grant the cross-petition because, as shown hereinbelow, the District Court decision is clearly correct, and the Trustee's arguments to the contrary are clearly erroneous, if not frivolous.

8. Finally, resolution of the questions presented by the cross-petition would be of little prospective importance because of recent legislative developments. First, SIPA recently has been amended so as to delete certain references to Chapter X of the Bankruptcy Act which the Trustee misapprehends in order to support his jurisdictional contentions (see pp. 23-27 and nn. 17, 20-22, *infra*). Second, Congress has passed and sent to the President an act (H.R. 8200, 95th Cong., 2d Sess., 124 CONG. REC. H 11,047 (daily ed. Sept. 28, 1978), as amended) which would substantially reform the entire Bankruptcy Act and, more significantly, would completely change the jurisdictional provisions applicable to any future case similar to this one. *See* H.R. 8200, *supra*, Title II, Section 241, 124 CONG. REC. H 11,082 (daily ed. Sept. 28, 1978), *as amended by the Senate,* 124 CONG. REC. S 17,405 (daily ed. Oct. 6, 1978).

II

The District Court Correctly Held That Touche Ross Did Not "Consent" To Jurisdiction In This Plenary Action By Filing Proofs Of Claim

The District Court correctly held (56a-57a) that Touche Ross did not, by filing its proofs of claim in the Weis liquidation proceeding, "consent" to jurisdiction

with respect to the Trustee's common law claims in this plenary action, for at least two reasons. First, the filing of the proofs of claim calls into play only the *summary* jurisdiction of the bankruptcy court, and is insufficient to confer jurisdiction in this *plenary* action. Second, even if it were assumed that "consent" to jurisdiction in a *plenary* action could be inferred from filing a proof of claim to the same extent that consent to *summary* jurisdiction can be so inferred, there still would be no jurisdiction here because Touche Ross' proofs of claim would not have conferred jurisdiction of the Trustee's common law claims even in a summary proceeding.

A. The Proofs of Claim Do Not Confer Jurisdiction In This Plenary Action

Section 23 of the Bankurptcy Act, 11 U.S.C. § 46, limits a district court's subject matter jurisdiction over an action brought by a trustee, by providing that such jurisdiction exists only to the extent that, had the bankruptcy proceeding not been instituted, there would have been jurisdiction if the action were between the bankrupt and the defendant. From its first interpretation by this Court, and as the Trustee concedes (Cross-Petition, p. 7 n.5), Section 23 has been held to be a limitation on the jurisdiction of the district courts, and to reflect a Congressional intention to direct *plenary* actions by trustees to the State courts. *See, e.g., Bardes* v. *Hawarden Bank*, 178 U.S. 524, 538 (1900); *Kelley* v. *Gill*, 245 U.S. 116 (1917); *Schumacher* v. *Beeler*, 293 U.S. 367, 374 (1934); *Williams* v. *Austrian*, 331 U.S. 642, 649 (1947).

Section 23b also contains a provision which authorizes the exercise of federal jurisdiction "by consent of the defendant". The provision regarding consent was included as a concession to the defendant who "might

not object to—indeed would welcome—federal court jurisdiction." *Tenenbaum* v. *Walter E. Heller & Co.*, 308 F.Supp. 1085, 1087 and n.9 (S.D.N.Y. 1970) (citing remarks of Senator Lindsay at 30 Cong. Rec. 601-602 (1897)).

However, the filing of a proof of claim does not constitute such "consent" to *plenary* jurisdiction under Section 23. As the Tenth Circuit has unequivocally stated,

> "a claimant does not consent to the exercise of the bankruptcy court's plenary jurisdiction by filing his claim in the bankruptcy proceedings." *Katchen* v. *Landy*, 336 F.2d 535, 537 (10th Cir. 1964), *aff'd*, 382 U.S. 323 (1966).

Although in certain circumstances *summary* jurisdiction may be exercised on the basis of consent inferred from the act of filing a proof of claim, *plenary* jurisdiction may not be exercised on such a basis. *Tamasha Town & Country Club* v. *McAlester Const. Fin. Corp.*, 252 F.Supp. 80, 89 (S.D. Cal. 1966) ("the policy underlying the doctrine of consent to summary jurisdiction by acts of the claimant, is avoiding multiplicity of actions and permitting the casting of accounts between the parties. Neither of these would be advanced by extending the doctrine of consent by acts of the claimant to a plenary proceeding"). It is for reasons of judicial economy that courts have treated the act of filing a proof of claim as consent by the creditor to *summary* jurisdiction with respect to certain claims which a trustee wishes to assert as counterclaims in the liquidation proceeding itself (see pp. 17-18, *infra*). There is no justification (and the Trustee cites no authority) for permitting him—in derogation of the very reason for implying such consent in the first place—to utilize the doctrine of consent to

summary jurisdiction to assert his claims outside of the liquidation proceeding itself and in a separate *plenary* action.[12]

The type of consent which is necessary to support *plenary* jurisdiction under Section 23 is express consent by a defendant to the jurisdiction of the district court over the plenary action or consent by the defendant's pleading to the merits in the plenary action without objection to jurisdiction. 2 W. COLLIER, BANKRUPTCY ¶ 23.14, p. 602.[13] But where, as here, a defendant makes no answer on the merits and expressly objects to

[12]Moreover, it would have an obviously chilling effect upon the assertion of legitimate claims in bankruptcy proceedings to hold that the price to be paid by a claimant for filing a claim (no matter how relatively small and no matter if undisputed) is submission to *plenary* jurisdiction of any action to be commenced against that claimant by the trustee. The point is vividly demonstrated here, where Touche Ross filed claims in the liquidation proceeding aggregating only $79,636, and is therefore alleged to have "consented" to *plenary* jurisdiction over the trustee's claims in this action of $51,000,000.

[13]Courts have found consent to *plenary* jurisdiction in a general appearance and a plea on the merits, *Schumacher* v. *Beeler, supra*, 293 U.S. at 369 (declining to permit party, after these steps, to withdraw consent and contest jurisdiction); explicit admissions of jurisdiction and litigation on the merits, *Gins* v. *Mauser Plumbing Supply Co.*, 148 F.2d 974, 977 n.5 (2d Cir. 1945); a specific concession of jurisdiction and litigation on the merits, *Tilton* v. *Model Taxi Corp.*, 112 F.2d 86, 88 (2d Cir. 1940); litigation on the merits and a failure to object to jurisdiction, *Toledo Fence & Post Co.* v. *Lyons*, 290 Fed. 637, 639-640 (6th Cir. 1923); *In re Prima Co.*, 98 F.2d 952, 959 (7th Cir.), *cert. denied*, 305 U.S. 658 (1938); a stipulation that the court had jurisdiction, *Green* v. *Gage*, 186 F.2d 984, 986-987 (5th Cir. 1951); pleading to the merits and taking testimony, *Detroit Trust Co.* v. *Pontiac Savings Bank*, 196 Fed. 29, 31-32 (6th Cir. 1912), *aff'd*, 237 U.S. 186 (1915); answering on the merits or appearing in court to seek affirmative relief, *May* v. *Moss*, 194 F.2d 133, 137 (8th Cir.), *cert. denied*, 343 U.S. 952 (1952); and appearing, pleading to the merits, affirmatively requesting relief and litigating the merits at trial and on appeal, *Wymard* v. *McCloskey & Co.*, 342 F.2d 495, 497-498 (3d Cir.) (en banc), *cert. denied*, 382 U.S. 823 (1965) (3 judges dissented, taking the position that under the circumstances even these facts did not suffice to show consent to jurisdiction).

jurisdiction by moving to dismiss the action for lack of subject matter jurisdiction, no consent exists or may be implied under Section 23. *See Halpert* v. *Engine Air Service*, 116 F.Supp. 13, 15 (E.D.N.Y. 1953); *cf.*, *Stiefel* v. *14th Street & Broadway Realty Corp.*, 48 F.2d 1041, 1043 (2d Cir. 1931).

The Trustee's basic error in arguing for his so-called "consent" jurisdiction (Cross-Petition, pp. 7-12) lies in the fact that he simply ignores the clear distinction between this *plenary* action and whatever *summary* proceedings he might have commenced in the Weis liquidation proceeding by reason of Touche Ross' proofs of claim therein. Consequently, his entire argument is nothing more than a confusing hodgepodge of concepts purportedly applicable in *summary* proceedings, discussed on the patently erroneous assumption that those concepts automatically are applicable to separate *plenary* actions.

B. The Proofs Of Claim Would Not Confer Jurisdiction Even In A Summary Proceeding

It is also clear that the filing of Touche Ross' proofs of claim would not have conferred jurisdiction over the Trustee's common law claims even if he had asserted them as counterclaims in a *summary* proceeding. This is because, as the District Court expressly found, Touche Ross' claims and the Trustee's claims are "unrelated" (56a).

For reasons of judicial economy, courts have been willing to consider the act of filing a proof of claim as consent to summary jurisdiction of such counterclaims, where the claim and counterclaim are "related", "closely related" or "in the nature of 'compulsory counterclaims'" (see cases cited in Cross-Petition, pp.

11-12).[14] The Trustee concedes here that his common law claims (which arise from Touche Ross' mid-1972 audit of the 1972 Weis financial reports) and the Touche Ross claims in the Weis liquidation proceeding (which relate to services performed by Touche Ross in late 1972 and 1973) "may not be closely related enough to satisfy a strict compulsory counterclaim standard" (Cross-Petition, p. 12), although he does contend that there is some ill-defined, nebulous "logical relationship" between them *(id.)*—a contention expressly rejected by the District Court in finding that the claims are "unrelated". Dilution of the "relatedness" requirement recognized by the applicable cases to the extent which would be required to sustain "consent" jurisdiction of the Trustee's common law claims simply would make illusory the judicial economies which supposedly justify the doctrine of jurisdiction by implied consent.

The Trustee apparently recognizes the weakness of his contention that his claims satisfy some formulation of the "relatedness" requirement, because the main thrust of his argument is that such requirement should be abandoned, and that "consent" jurisdiction should ex-

[14]This prevents a trustee from having to present the same evidence twice, once before the bankruptcy judge to defend against a creditor's claim and once before the court with plenary jurisdiction to make his affirmative recovery. *See In re Farrell Publishing Co.*, 130 F.Supp. 449 (S.D.N.Y. 1955) ("The same proof will be required in defending against [the creditor's] claim as is necessary in the proof of the trustee's counterclaim"); *Columbia Foundry Co.* v. *Lochner,* 179 F.2d 630, 633 (4th Cir. 1950) (creditor must produce the same evidence to save his claim as he would to defeat an affirmative judgment against him on the counterclaim). Moreover, once a bankruptcy judge adjudicates the creditor's claim, principles of collateral estoppel would prevent relitigation of some if not all of the issues in a trustee's closely related counterclaim, so that requiring a trustee to bring a separate plenary action against the claimant to litigate a matter already settled between them would be to exalt form over substance. *Cf., Katchen* v. *Landy,* 382 U.S. 323, 333-335 (1966). *See also Giffin* v. *Vought,* 175 F.2d 186, 189-190 (2d Cir. 1949).

tend to *any* "mutual" claim capable of being set-off under Section 68a of the Bankruptcy Act, 11 U.S.C. § 108a. The Trustee relies upon *Katchen* v. *Landy,* 382 U.S. 323 (1966), which held only that by submitting a claim in bankruptcy a creditor subjects himself to the bankruptcy court's summary jurisdiction to order the return of a voidable preference and which concededly "did not decide whether the same rule applied to other types of claims by a Trustee" (Cross-Petition, p. 9), and upon *dictum* in a Second Circuit decision, *Conway* v. *Union Bank of Switzerland,* 204 F.2d 603, 607 (2d Cir. 1953). However, the Trustee acknowledges that "the lower federal courts have not applied the same rationale as *Katchen*", and that the *dictum* in *Conway* is inconsistent with subsequent holdings in the Second Circuit itself (Cross-Petition, pp. 10-11).

There are good reasons for not extending the *Katchen* rationale to any unrelated "mutual" claim capable of being set-off under Section 68a. In the first place, "[i]t should be remembered that [Section] 68 constitutes merely a statutory recognition of an accepted doctrine, with exceptions thereto, and does not govern the question of jurisdiction of a court to give effect to the doctrine". 4 W. COLLIER, BANKRUPTCY ¶ 68.02[1] at 854. Moreover, although (as the Trustee points out—Cross-Petition, p. 9) in the *Katchen* situation "the determination of whether a claimant has received a voidable preference [was] a prerequisite to determining the size and allowability of his claim under Section 57g of the Bankruptcy Act", determination of "mutual" claims pursuant to Section 68a is not (as the Trustee incorrectly argues, *id.* at p. 10) such a prerequisite, because the provisions of Section 68a have been held to be "permissive rather than mandatory". *Cumberland Glass Manufacturing Co.* v. *De Witt & Co.,* 237 U.S. 447, 455 (1915).

The *Katchen* holding was premised expressly upon the need to make the bankruptcy laws " 'inexpensive in [their] administration' " and " 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period' ". 382 U.S. at 328. However, to extend the *Katchen* rationale to any unrelated mutual claim would conflict with *Daniel* v. *Guaranty Trust Co.*, 285 U.S. 154 (1932), in which this Court rejected the contention that a creditor by filing a claim for reclamation of property "entered its general appearance and in effect consented to submit itself to summary proceedings . . . in respect of matters having no immediate relation to the claim which it had presented". *Id.* at 162. In *Daniel* this Court found administrative needs not to be sufficiently compelling so as to require a creditor, as the price for filing a claim, to relinquish the procedural safeguards which would be available in a plenary action brought by the Trustee on his unrelated claims:

> "In practice such a rule might lead to unfortunate complications and deprive owners of property of fair opportunity to recover. The risk incident to a general appearance and consent to adjudication of claims of all kinds might easily deter where the right to recover is clear. Moreover, the choice would not be between tribunals merely, but between the ordinary processes in a plenary suit and a summary hearing. . . . We cannot conclude that the demand for speedy administration of bankrupt estates is enough to justify such a radical departure from ordinary procedure." 285 U.S. at 162.[15]

[15]The summary jurisdiction of the bankruptcy judge abrogates a claimant's right to trial by jury which he would have if he had not filed his claim but rather abided the trustee's plenary suit, *Katchen* v. *Landy*, *supra*, 382 U.S. at 336-340 (1966), a right normally entitled to great deference, *Beacon Theatres* v. *Westover*, 359 U.S. 500, 510-511 (1959) (right to jury trial lost "only under the most imperative circumstances"). Consequently, courts have been very cautious in enlarging that summary jurisdiction. *See In re Behring & Behring*, 445 F.2d 1096, 1098-1099 (5th Cir.), *cert. denied*, 404 U.S. 991 (1971); *Gill* v. *Phillips*, 337 F.2d 258, 262-263 (5th Cir. 1964); *In re Carnell Constr. Corp.*, 424 F.2d 296, 298 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970); *In re Beasley-Gilbert's, Inc.*, 285 F.Supp. 359, 363 (S.D. Ohio 1968); Ferguson, *The Consensual Basis of Subject-Matter Jurisdiction in Matters of Bankruptcy: Fact and Fiction*, 14 Rutgers L. Rev. 491, 493, 511 (1959).

Moreover, the Trustee cannot retain the jurisdictional basis recognized in *Katchen* and at the same time cure the obvious injustice to the creditor recognized in *Daniel* simply by commencing (as was done here) a separate federal plenary action. Although such a plenary action would eliminate the procedural disadvantages to the creditor of a summary proceeding, it also would eliminate the reasons of judicial economy upon which the *Katchen* rationale is premised (see also pp. 17-18, *supra*). The *Katchen* holding thus simply cannot be extended, consistent with the concerns recognized in *Daniel* and other cases (see p. 18 n.14, *supra*), to any unrelated "mutual" claim asserted by the Trustee.

III

The District Court Correctly Held That Section 23 Of The Bankruptcy Act Is Applicable To Preclude The Exercise Of Bankruptcy Act Jurisdiction, And That The Other Statutory Provisions Relied Upon By The Trustee Do Not Require A Contrary Result

The District Court correctly held (55a-56a) that this action "is controlled by [Section 23 of the Bankruptcy Act] 11 U.S.C. § 46 which [is incorporated into SIPA by Section 6(c)(1) thereof and which] provides that a trustee in bankruptcy may sue only in the courts where

the bankrupt might have sued", and that subject matter jurisdiction of the Trustee's common law claims is lacking because "[d]iversity jurisdiction would not exist of an action by Weis against Touche [Ross]". The Trustee erroneously argues that the District Court was incorrect (Cross-Petition, p. 14), and that under other statutory provisions—*viz.*, Sections 5(b)(2) and 6(b)(1) of SIPA and Section 115 of the Bankruptcy Act—the District Court had "the 'powers' of a Chapter X court and a federal equity receivership court" and thus had "*plenary* jurisdiction over any action commenced by the Trustee" (*id.* at pp. 4, 13-14).

A. Section 23 Is Incorporated Into SIPA By Section 6(c)(1) Thereof And Applies Here To Preclude Bankruptcy Act Jurisdiction

Section 6(c)(1) of SIPA makes applicable to all SIPA liquidations "the provisions of Chapter X and such of the provisions . . . of Chapters I to VII, inclusive, of the Bankruptcy Act as section 102 of Chapter X would make applicable if an order of the court had been entered directing that bankruptcy be proceeded with pursuant to the provisions of such Chapters I to VII". Section 102 of the Bankruptcy Act, which is part of Chapter X, expressly provides that Section 23 will apply when an order of the type referred to in Section 6(c)(1) of SIPA (*i.e.*, an order "directing that bankruptcy be proceeded with") is entered.[16]

Thus, as the District Court properly recognized, the combination of Section 6(c)(1) of SIPA and Section 102 of the Bankruptcy Act results in Section 23 of the Bankruptcy Act being applicable in all SIPA liquidation

[16]Section 6(c)(1) of SIPA and Section 102 of the Bankruptcy Act are more fully set forth in the appendix to the cross-petition.

proceedings. *See Securities and Exchange Commission* v. *Morgan Kennedy & Co., Inc.*, [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶94,568 at p. 95,966 (S.D.N.Y. 1974); 6 W. COLLIER, BANKRUPTCY ¶1.06 at 209. That result is entirely consistent with the Congressional recognition in Section 6(a)(4) of SIPA that the overriding purpose of a SIPA proceeding is "to liquidate the business of the debtor" and the reiteration in Section 6(c)(1) that "in no event shall a plan of reorganization be formulated". *Cf.* 6 W. COLLIER, BANKRUPTCY ¶3.18 at 547-548 (reasons for suspension in Chapter X *reorganizations* of limitations imposed by Section 23 are inapposite when bankruptcy liquidation is to be proceeded with).[17]

Since Section 23 permits the Trustee to assert his common law claims here only if there would have been diversity jurisdiction in an action by Weis against Touche Ross (see p. 6, *supra*), and since no such diversity jurisdiction would have existed (see p. 6 n. 6, *supra*), Section 23 operates here—as the District Court held—to deprive it of jurisdiction over the Trustee's common law claims.

[17]Recently, and more than two years after this action was commenced, SIPA was amended by Pub. L. No. 95-283, 92 Stat. 249 (May 21, 1978). The reference to Section 6(c)(1) is to that section as in effect prior to such amendment. As amended, the section (now renumbered Section 6(b), 15 U.S.C.A. § 78fff(b) (Supp. II 1978)) provides that "a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under, the Bankruptcy Act". Pursuant to amended Section 16(1), 15 U.S.C.A. §78lll(1) (Supp. II 1978), "[t]he term 'Bankruptcy Act' means . . . those provisions of the Bankruptcy Act relating to ordinary bankruptcy (chapters I through VII)". The purpose of the amendment was to "eliminate the wholesale incorporation of chapter X of the Bankruptcy Act". S. REP. No. 95-763, 95th Cong. 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 1344, 1354. Under the amended statute, as under the statute prior to amendment, Section 23 is applicable and the plenary jurisdiction of the district court is limited as in ordinary bankruptcy under Chapters I through VII. The amendment simply makes more clear that the Chapter X reorganization provisions relied upon by the Trustee are inapplicable.

B. Sections 5(b)(2) And 6(b)(1) Of SIPA Do Not Provide Jurisdiction For The Trustee's Common Law Claims

The Trustee erroneously argues that Sections 5(b)(2) and 6(b)(1) of SIPA confer on the District Court jurisdiction of his common law claims (Cross-Petition, pp. 13-14).

1. SECTION 5(b)(2).—The Trustee erroneously asserts that jurisdiction of his common law claims is provided by the language—which he takes out of context—of Section 5(b)(2) that the court in a SIPA proceeding shall have the "*powers* . . . of a court of bankruptcy and of a court in a proceeding under Chapter X of the Bankruptcy Act" (Cross-Petition, p. 13). The full sentence of Section 5(b)(2) from which the Trustee selectively quotes reads as follows (with the critical portion omitted by the Trustee set forth in italics):

> "Upon the filing of an application pursuant to subsection (a)(2) of this section, the court to which application is made shall have *exclusive jurisdiction of the debtor involved and its property wherever located* with the powers, to the extent consistent with the purposes of this act, of a court of bankruptcy and of a court in a proceeding under chapter X of the Bankruptcy Act" (emphasis added).

The italicized words make clear that this sentence of Section 5(b)(2) applies only to the *summary* jurisdiction of the bankruptcy judge over the debtor and his assets, and is not a section providing plenary jurisdiction over actions against third persons. Although the legislative history does not discuss the sentence, its language is

familiar from the Bankruptcy Act [18] and has uniformly been held therein to provide for summary jurisdiction of a bankruptcy judge over the assets in the possession of the debtor, essentially a form of *in rem* jurisdiction.[19] Of course, it is well-settled by this Court that claims against third persons may not be adjudicated under the summary jurisdiction of the bankruptcy courts, but must be the subject of a plenary suit, *e.g.*, *Cline* v. *Kaplan*, 323 U.S. 97 (1944); *Taubel-Scott-Kitzmiller* v. *Fox*, 264 U.S. 426 (1924); *Kelley* v. *Gill*, 245 U.S. 116 (1917); *Harrison* v. *Chamberlin*, 271 U.S. 191, 193-195 (1926), and the cases recognize that the summary jurisdiction conferred by the "exclusive jurisdiction" language of the Bankruptcy Act sections referred to above does not extend to a power to adjudicate claims against third persons. Moreover, the context in which the "powers" language of Section 5(b)(2), upon which the Trustee relies, is used demonstrates that it means "powers" with respect to the property over which the court has jurisdiction—*i.e.*, the

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[18] Such language is used in Section 75(n), 11 U.S.C. § 203(n) (farmer's relief); Section 77, 11 U.S.C. § 205 (railroad reorganizations); Section 77B(a), Act of June 7, 1934, § 77B(a), 48 Stat. 911, 912 (predecessor of Chapter X; now repealed); Section 82(a) of Chapter IX, 11 U.S.C. § 402(a); Section 111 of Chapter X, 11 U.S.C. § 511; Section 311 of Chapter XI, 11 U.S.C. § 711; Section 411 of Chapter XII, 11 U.S.C. § 811; and Section 611 of Chapter XIII, 11 U.S.C. § 1011.

[19] *E.g.*, *In re Standard Gas & Elec. Co.*, 119 F.2d 658, 661, 662 (3d Cir. 1941) (Section 77B(a)). *See also, e.g.*, *Continental Illinois Nat'l Bank & Trust* v. *Chicago, R.I. & Pac. Ry. Co.*, 294 U.S. 648, 681-684 (1935) (Section 77); *In re Prudence Bonds Corp.*, 75 F.2d 262 (2d Cir. 1935) (Section 77B(a)); *Thompson* v. *Terminal Shares*, 104 F.2d 1, 9 (8th Cir. 1939) (Section 77B(a)); *Mar-Tex Realization Corp.* v. *Wolfson*, 145 F.2d 360, 362-363 (2d Cir. 1944) (Section 111); *Duda* v. *Sterling Mfg. Co.*, 178 F.2d 428 (8th Cir. 1949) (Section 111); *Slenderella Systems of Berkeley, Inc.* v. *Pacific Tel. & Tel.*, 286 F.2d 488 (2d Cir. 1961) (Section 311); *In re Oliver*, 127 F.Supp. 842, 845-847 (D. Kan. 1955) (Section 611); *Tamasha Town & Country Club* v. *McAlester Constr. Fin. Corp.*, 252 F.Supp. 80, 85 and n.1 (S.D. Cal. 1966) (Section 311).

power to use all the remedial devices a bankruptcy court or a Chapter X court might use to protect the debtor's property.

Since Section 5(b)(2) uses precisely the same language as is found in the Bankruptcy Act, and since that language has been expressly held not to confer plenary jurisdiction over actions brought by a trustee against third persons, Section 5(b)(2) cannot properly be read to provide such jurisdiction over the Trustee's common law claims. *See Securities & Exchange Commission* v. *Morgan Kennedy & Co., supra,* [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶94,568 at p. 95,971.[20]

2. SECTION 6(b)(1).—The Trustee errs in suggesting that Section 6(b)(1) of SIPA has some relevance to determining the District Court's jurisdiction (Cross-Petition, p. 13). Section 6(b)(1) prescribes only the powers of a SIPA trustee, and has nothing to do with the jurisdiction of a district court.[21]

C. Section 115 Of The Bankruptcy Act Does Not Provide Jurisdiction For The Trustee's Common Law Claims

The Trustee's assertion that Section 115 of Chapter X is a grant of jurisdiction is erroneous. Section 115 confers upon a Chapter X court only the "powers" of an equity receivership court, whereas in the same sentence it also speaks of the "jurisdiction, powers and duties" otherwise conferred. This clearly shows that Congress understood that the terms "powers" and "jurisdiction" in Section 115 signified separate and distinct concepts

[20]Section 5(b)(2), as amended in 1978, 15 U.S.C.A. §78eee(b)(2) (Supp. II 1978), even deletes the "powers . . . of a court in a proceeding under Chapter X" language relied upon by the Trustee.

[21]As amended in 1978, that section (which is renumbered Section 7(a), 15 U.S.C.A. §78fff-1(a) (Supp. II 1978)) also deletes the reference to the "powers" of a Chapter X trustee upon which the Trustee relies.

and compels the conclusion that Congress intended to confer only "powers" and not "jurisdiction". *See* 6 W. COLLIER, BANKRUPTCY ¶3.18 at 546-547 n. 34.[22]

Congress took the language of Section 115 from the virtually identical language of Section 77B(a) of the Bankruptcy Act, which had been enacted in the Corporate Reorganization Act of 1934.[23] It was uniformly held that Section 77B(a) did not create a grant of jurisdiction to the district courts. *In re Prudence Bonds Corp., supra,* 75 F.2d at 263; *United States* v. *Tacoma Oriental S. S. Co.,* 86 F.2d 363, 368 (9th Cir. 1936); *In re Standard Gas & Elec. Co., supra.*

A consistent series of cases has interpreted the "powers" language of Section 115 and the predecessor language of Section 77B to mean the non-jurisdictional substantive powers over property exercised by a court of equity. As the Third Circuit phrased it, with regard to Section 77B(a),

> "This reference to the powers which a federal equity court exercises when it appoints a receiver is to the substantive powers which such a court exercises over the property in its custody rather than to its jurisdiction to entertain plenary suits growing out of the receivership." *In re Standard Gas & Elec. Co., supra,* 119 F.2d at 662.

Accord, In re Prudence Co., 82 F.2d 755, 757 (2d Cir.), *cert. denied,* 298 U.S. 685 (1936); *In re Prima Co.,* 98 F.2d 952, 958 (7th Cir.), *cert. denied,* 305 U.S. 658 (1938).

[22]The 1978 amendments to SIPA deleting wholesale incorporation of Chapter X provisions eliminate any incorporation into SIPA of the provisions of Section 115.

[23]In enacting Chapter X, "[b]y and large . . . the substance of section 77B is preserved" and "[s]ection 115 is derived from section 77B(a), with only minor changes in language." S. REP. No. 1916, 75th Cong., 3d Sess. at 19, 24 (1938). Hence, decisions interpreting Section 77B(a) are applicable to Section 115.

Williams v. *Austrian, supra,* relied upon by the Trustee, actually found it unnecessary to reach the issue of whether Section 115 was jurisdictional because of its holding that, in light of Section 102's suspension of the limitations of Section 23 during reorganization, jurisdiction there existed by virtue of Section 2a(7). In the footnote referred to by the Trustee, this Court, after pointing out the decisions which held the "powers" language of Section 77B and Section 115 to be "non-jurisdictional", merely cited *dicta* in two other lower court cases as conflicting interpretations. *Id.* at 659-600 n. 45.[24]

Finally, even if the "powers" language of Section 115 were assumed to be a grant of jurisdiction, Section 23 would limit that jurisdiction. The "powers" provided for in Section 115 are those "not inconsistent with the provisions of this chapter". One of the provisions of "this chapter" is Section 102, which explicitly makes Section 23 applicable in the liquidation context present here.[25] *Cf., e.g., In re Standard Gas & Electric Co., supra,* 119 F.2d at 660-663 (Section 23 incorporated into

[24]The Trustee also erroneously relies on the holding of *Williams* v. *Austrian* that broad plenary jurisdiction under Section 2a(7) of the Bankruptcy Act, unlimited by the restrictions set forth in Section 23 thereof, exists in a Chapter X reorganization. As *Williams* v. *Austrian* makes clear, such jurisdiction is available only by virtue of Section 102's suspension of Section 23 *while reorganization actually is proceeding.* Section 6(c)(1) of SIPA provides, however, that Section 102 must be read as if bankruptcy liquidation has been ordered, under which circumstance Section 102 requires termination of any suspension of Section 23.

[25]The similar phrase in Section 2a(7), "except as herein otherwise provided", has been consistently held to be a reference to Section 23. *Williams* v. *Austrian, supra,* 331 U.S. at 649; *First National Bank* v. *Title & Trust Co.,* 198 U.S. 280, 298 (1905); *Bryan* v. *Bernheimer,* 181 U.S. 188, 194 (1901); *Bardes* v. *Hawarden Bank, supra,* 178 U.S. at 535-536.

Section 77B); *Tilton* v. *Model Taxi Corp.,* 112 F.2d 86, 88 (2d Cir. 1940) (Section 23 held to control jurisdiction under Section 77B, despite the presence there of the predecessor language to Section 115); *In re Prima Co., supra,* 98 F.2d at 958 (the predecessor language to Section 115 did not "amount to a repeal by implication of Section 23").

CONCLUSION

For the foregoing reasons, the Trustee's cross-petition for a writ of certiorari should be denied.

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Respectfully submitted,

ARNOLD I. ROTH
Attorney for Respondent
Touche Ross & Co.
575 Madison Avenue
New York, New York 10022
(212) 644-7000

Of Counsel

ARTHUR S. LINKER
ROSENMAN COLIN FREUND LEWIS & COHEN
575 Madison Avenue
New York, New York 10022

see

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